No. 19-3827

In the United States Court of Appeals for the Sixth Circuit

IN RE: STATE OF OHIO

ON PETITION FOR WRIT OF MANDAMUS FROM THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, NOS. 1:18-OP-45090, 1:17-OP-45004

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER STATE OF OHIO

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RULE 26.1 DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is not a publicly traded corporation. It has no parent corporation, and there is no public corporation that owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*[*]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

Although the dispute underlying the State of Ohio's mandamus petition concerns litigation relating to the opioid epidemic, the Chamber is not participating because of that subject matter. Rather, the Chamber files this brief because the State's petition concerns the troubling surge of civil lawsuits against businesses brought by cities, counties,

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[*] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the Chamber certifies that: (a) no party's counsel authored this brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (c) no person, other than the Chamber, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

and other municipalities. Indeed, the Chamber has participated as *amicus curiae* in a number of cases arguing against municipalities pursuing litigation beyond their authority.[1]

The Chamber does not agree with all of the State's legal arguments concerning the opioid epidemic. But there is no denying the magnitude of the opioid crisis in America. It is a devastating social and economic problem—one that deserves serious solutions. The plethora of lawsuits peddled by a vexatious plaintiffs' bar to the country's 40,000-odd municipal entities is not a serious attempt to solve the problem. It is an attempt by hundreds of plaintiffs' law firms to enrich themselves at the expense of more efficient and effective approaches. Not only do these municipal lawsuits threaten to displace states' primary sovereign role to represent and protect the interests of their residents; they

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[1] *See, e.g.*, *City of Oakland v. BP P.L.C.*, No. 18-16663 (9th Cir.), *brief available at* https://perma.cc/CM4Z-44CT; *City of New York v. Chevron Corp.*, No. 18-2188 (2d Cir.), *brief available at* https://perma.cc/V4HZ-KGD9; *Abbott Labs. v. Superior Court*, 233 Cal. Rptr. 3d 730 (Ct. App. 2018), *brief available at* https://perma.cc/FP7T-W9FD; *Cty. of Butler v. CenturyLink Commc'ns, LLC*, 207 A.3d 838 (Pa. 2019), *brief available at* https://perma.cc/H8EQ-HPUV; *Am. Bankers Mgmt. Co. v. Heryford*, 885 F.3d 629 (9th Cir. 2018), *brief available at* https://perma.cc/Z3EK-X6U3; *Grady v. Hunt Cty.*, No. 3:16-cv-1404 (N.D. Tex.), *brief available at* https://perma.cc/F2VU-45C3.

threaten the effective administration of justice by causing, among other things, staggering and unnecessary litigation costs, delayed and incomplete settlements, and a redirection of compensation from those who may have suffered injury from the conduct. This distortion of the legal system has tremendous consequences for the Nation's business community and thus the national economy.

The Chamber is uniquely situated to assist the Court in understanding the underexplored dangers of this trend of affirmative municipal litigation. Not only have its members been involved in such litigation themselves, but the Chamber's Institute for Legal Reform recently published an in-depth report on the subject.[2]

SUMMARY OF ARGUMENT

I. The gargantuan multi-district litigation (MDL) pending in this Circuit starkly illustrates the perils of affirmative municipal litigation. This MDL consolidates claims by nearly 2,000 cities, counties, and other municipalities nationwide, with two Ohio counties set to begin a

[2] *See* U.S. Chamber Institute for Legal Reform, Mitigating Municipal Litigation: Scope and Solutions (Mar. 2019) [hereinafter ILR Report], https://www.instituteforlegalreform.com/research/mitigating-municipality-litigation-scope-and-solutions.

consolidated bellwether trial next month, seeking $8 billion in damages against certain drug manufacturers and distributors. Pet. 2. As the State of Ohio explains, these municipal lawsuits essentially duplicate the lawsuits the states themselves have already brought in their respective state courts. *Id.* at 3. Such duplicative litigation by municipalities significantly reduces the funds available to compensate injured individuals. Municipalities' increasing use of contingency-fee arrangements to finance and carry out this litigation further shifts substantial settlement funds away from the states and their residents and into the pockets of plaintiffs' lawyers.

II. Affirmative municipal litigation also imposes significant costs on the Nation's business community and thus the national economy. Because the states and municipalities have brought essentially the same claims in different court systems—state and federal, respectively—businesses face increased litigation costs and staggering challenges to reach a global settlement. Litigating and negotiating with 50 state attorneys general is much easier than doing so with thousands of municipalities. The feeding frenzy of municipal lawsuits makes global settlements nearly impossible. And the resulting lack of finality and pre-

dictability risks bankrupting smaller businesses and severely stunting the stability and growth of larger ones.

ARGUMENT

I. Affirmative Municipal Litigation Imposes Significant Costs on Residents

Municipalities' use of affirmative lawsuits is a relatively recent and underexplored trend. It arguably first emerged in the 1990s. ILR Report at 4. Since then, municipalities have brought lawsuits against manufacturers of handguns and lead paint, financial services companies, and, more recently, companies with data breaches as well as those with products or services alleged to have contributed to climate change. *See id.* at 4–5, 9–13 (detailing history of such litigation).

With nearly 2,000 municipalities participating in this MDL, however, this case takes affirmative municipal litigation to an entirely new level. *See id.* at 11 (observing that "opioid litigation is likely to dominate the landscape of municipal litigation, at least in the near term, simply due to the high volume of cases and the considerable resources being expended by cities, counties, and plaintiffs' firms involved").

Economic incentives have principally driven the upsurge in affirmative municipal litigation. As municipalities have faced serious

budget constraints and substantial limitations on the ability to raise revenue, affirmative municipal litigation has presented an enticing, seemingly "cost-less" opportunity to raise additional revenue. *See id.* at 6–7 (detailing budget constraints). After all, affirmative litigation by states and municipalities has at times resulted in historically large settlements. *See id.* at 5–6 (providing examples). And in light of pervasive contingency-fee arrangements with private plaintiffs' firms in these lawsuits, municipalities have little, if anything, to lose financially from engaging in such litigation. *Id.* at 8.

Municipalities may bear no costs, but this litigation imposes substantial costs on the states and their residents.

A. Duplicative Municipal Litigation Undermines the State's Sovereign Role in Representing and Protecting the Interests of its Residents

Affirmative municipal litigation, especially when it duplicates or conflicts with the state government's efforts, displaces the state's primary sovereign role in protecting the interests of its residents. As the State of Ohio puts it, "The prejudice to Ohio's sovereignty is twofold—only Ohio, not its counties, has the power and the right to represent the people of the State; and only Ohio, not its counties or a federal district

court, has the responsibility and the right to distribute proceeds of those claims." Pet. 15; *see id.* at 15–23 (further developing this argument).

This state sovereignty argument is not mere legalism. It goes to core substantive values of political accountability and the role of states under the Constitution of the United States. As the Supreme Court explained long ago, "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them." *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

Municipalities, in other words, do not represent the state as a whole but, instead, are created by state law to advance the state's interests at a local level. The Ohio Attorney General, like other state attorneys general, is elected in a statewide election to protect the public interest. Municipal attorneys, by contrast, are either locally elected or appointed by elected municipal officials motivated by local fiscal and political considerations. Simply put, "[a] city law director or county prosecutor is no substitute for the Ohio Attorney General." Pet. 28. Indeed, the State of Ohio argues that municipalities in Ohio lack *parens patriae* standing to bring these lawsuits. *Id.* at 2; *see also, e.g., Colorado River*

Indian Tribes v. Town of Parker, 776 F.2d 846, 848 (9th Cir. 1985) ("[Municipalities] cannot sue as *parens patriae* because their power is derivative and not sovereign."); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004) (same).

Despite their statutory focus on local concerns, officials' actions in municipal litigation may threaten to affect matters of statewide or national concern and to affect people far beyond the bounds of their individual jurisdictions. It is perhaps for this reason that the Ohio Supreme Court has long held that, under Ohio law, a "matter passes from what was a matter for local government to a matter of general state interest" outside municipal authority when "regulation of the subject matter affects the general public of the state as a whole more than it does the local inhabitants." *Cleveland Elec. Illuminating Co. v. City of Painesville*, 15 Ohio St. 2d 125, 129 (1968).

B. Municipal Litigation, Especially When Funded on a Contingency-Fee Basis, Frustrates Recovery for Individuals Actually Injured by the Conduct

The Chamber takes no position in this brief on the merits of the underlying legal theories brought by the State of Ohio and other states or any of the municipal plaintiffs in the MDL. But even if the various

plaintiffs ultimately prevail on the merits or reach a settlement with the defendants, municipal litigation risks disserving any individuals who may have been injured.

As municipalities collect a greater share of recoveries from defendant businesses, the amount of compensation available to residents for their injuries is reduced. *See* ILR Report at 16. Although municipal recoveries may (or may not) go toward programs to alleviate the problems caused by that conduct as a whole, they often do not compensate any particular injured individual.

Municipalities' routine use of contingency-fee arrangements with plaintiffs' lawyers further depletes any financial recoveries by the states and their residents, including those who suffered injuries from the alleged misconduct. The list of attorneys involved in this MDL nicely illustrates this point. Unlike municipalities, states do not necessarily face the same economic pressures to outsource the litigation expenses to plaintiffs' lawyers. Indeed, Ohio law expressly caps contingency fees for private attorneys to represent the State of Ohio in order to avoid excessive payouts. *See* Ohio Rev. Code § 9.492. Thus, when states reach global settlements with defendant businesses, it is far less likely that large

contingency fees will be paid out of the settlement proceeds to outside plaintiffs' lawyers.

II. Affirmative Municipal Litigation Introduces Grave Uncertainty and Costs for the Nation's Business Community

The states and their residents are not the only ones to shoulder the unnecessary costs of affirmative municipal litigation. Such litigation also imposes great costs on the business community—and thus the national economy—through the resulting lack of finality and predictably. The district court seemed to appreciate these costs: "Now it's easy to set—establish a team of 50 AGs. It's 50 men and women. That kind of team has been put together in lots of other lawsuits very effectively. They were here from the beginning. It's not so easy with 2000 litigating cities and counties and potentially 20 or 30,000 others." Aug. 6, 2019 Transcript, 48:9-14, *quoted by* Pet. 31–32.

Although many of the opioid lawsuits are consolidated in this MDL, plaintiffs and defendants face competing interests that can hinder litigation and judicial resolution or settlement. For example, approximately 500 lawsuits by municipalities and states are proceeding outside the MDL. *See* ILR Report at 14. That includes all of the states'

lawsuits, which have been brought in their own state courts. Pet. 2. Conclusion of this MDL would not resolve those claims, depriving the defendant businesses of the certainty that is typically a major advantage of large, multi-case resolutions.

This is particularly true for smaller defendants, such as regional pharmaceutical distributors, that may now face bankruptcy in the wake of the thousands of municipal lawsuits. And, as the State of Ohio notes, "any judgment or settlement between two Ohio counties and the defendants will draw down a limited pool of money available to satisfy these claims, and will do so in a way that risks defenses that are unique as against the counties." Pet. 21.

Accordingly, the dual aims of addressing plaintiffs' alleged harms while also providing defendants with finality and predictability are much more difficult to achieve when there is a flood of municipal litigation. It is ironic that the 1990s "Master Settlement Agreement that has helped inspire the current wave of municipal opioid litigation would likely have proved impossible to achieve had the states in question not negotiated as a largely unified group—a proposition that will likely be impossible to replicate with thousands of plaintiffs." ILR Report at 15.

This reduced capacity for settlement is not just bad for the business community. It protracts litigation, increases costs for all parties, and delays the implementation of programs such settlements are meant to fund. Federal courts should thus proceed cautiously to counteract the negative consequences of affirmative municipal litigation. And this MDL presents the most egregious case of duplicative, affirmative municipal litigation to date.

CONCLUSION

For these reasons, the Court should grant the State of Ohio's petition for writ of mandamus.

Respectfully submitted,

September 6, 2019

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,236 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I filed the foregoing brief using this Court's Appellate CM/ECF system. I have also served this brief via email on all of the parties listed in the service list appended to the State of Ohio's mandamus petition.

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